Mat Ali Hanafiah bin Mohamed; ex p Asia Commercial Finance (M) Bhd

HIGH COURT (KOTA BHARU) — BANKRUPTCY NO 29–889 OF 1994
IDRIS J
19 NOVEMBER 2000

Civil Procedure *— Appeal — Notice of — Appeal to judge in chambers against receiving and adjudicating orders — Time for filing — Application of law — — Whether notice of appeal should be filed in accordance with the Bankruptcy Rules 1969 or the Rules of the High Court 1980 — — Whether notice filed within time — Bankruptcy Rules 1969 r 89 & 276, Rules of the High Court 1980 O 56*

The senior assistant registrar made receiving and adjudicating orders against the judgment debtor ('JD') following a creditor's petition by Asia Commercial Finance (M) Bhd, the judgment creditor ('JC'). The JD was dissatisfied with those orders and filed a notice of appeal to the judge in chambers. When the appeal came before the court, the JC made a preliminary objection on the validity of the notice of appeal. The JC contended that the instant appeal, being an appeal to the judge in chambers, is governed by O 56 of the Rules of the High Court 1980 ('RHC'), particularly r 1(3) which states, inter alia, that the notice must be issued within five days after the judgment, order or decision appealed against was given and must be served not less than two clear days before the hearing date of the appeal. Thus, the notice of appeal was filed out of time and is invalid. The JC also claimed that r 89 of the Bankruptcy Rules 1969 ('the Rules') has no application here. The JD claimed that the notice was filed well within the time frame as is stipulated in r 89 of the Rules. The JD also referred to the pre amended r 276 of the Rules which states, inter alia, that Rules of the Supreme Court 1957, the precursor to the RHC has no application to proceedings in bankruptcy.

Held, dismissing the appeal with costs:

(1) Emphasis needs be placed on the expression 'respecting appeals from the High Court' and not 'to the High Court' (which includes a judge in chambers), therefore r 89 of the Rules is not intended to apply to cases in respect of the appeals from the registrar's decision to the judge in chambers. Rule 89 of the Rules is to be invoked when there is a further appeal to the higher court from the decisions of the judge in chambers (see p 525A, C).

(2) The amended r 276 of the Rules came into effect on 1 April 1993 via PU(A) 60/93. Now as from 1 April 1993, the Rules of the High Court 1980, in the absence of any rule regulating the proceeding in the Bankruptcy Act or Rules applies *mutatis mutandis*, whereas prior to the amendment, the Rules of the Supreme Court 1957, the precursor of the RHC, regulating the procedure in its civil jurisdiction, did not apply unless otherwise provided for by the Bankruptcy Rules. The amendment to r 276 of the Rules is to

cater for such situation as in this present appeal, thereby O 56 r 3 of the RHC applies in cases of appeal against the registrar's decision to the judge in chambers. The notice of appeal by the JD is time barred and therefore the notice is rejected (see p 525F–H).

[**Bahasa Malaysia summary**

Penolong pendaftar kanan telah membuat perintah-perintah penerimaan dan penghakiman terhadap penghutang penghakiman ('JD') berikutan satu petisyen pemiutang oleh Asia Commercial Finance (M) Bhd, pemiutang penghakiman ('JC'). JD telah berasa tidak puas hati dengan perintah-perintah tersebut dan telah memfailkan satu notis rayuan kepada hakim dalam kamar. Apabila rayuan tersebut dihadapkan ke mahkamah, JC telah membuat satu bantahan awal terhadap kesahihan notis rayuan tersebut. JC menegaskan bahawa rayuan pada masa itu, yang merupakan satu rayuan kepada hakim dalam kamar, adalah dikawal oleh A 56 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), khususnya k 1(3) yang menyatakan, antara lain, bahawa notis tersebut mestilah dikeluarkan dalam masa lima hari selepas penghakiman, perintah atau keputusan yang dirayukan terhadap diberikan dan mestilah disampaikan tidak kurang daripada dua hari lapang sebelum tarikh perbicaraan rayuan tersebut. Oleh itu, notis rayuan tersebut telah difailkan di luar had masa dan adalah tidak sah. JC juga mendakwa bahawa k 89 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah tersebut') tidak terpakai di sini. JD telah mendakwa bahawa notis tersebut telah difailkan dalam jangka masa sebagaimana yang dinyatakan dalam k 89 Kaedah tersebut. JD juga merujuk kepada pra pindaan k 276 Kaedah tersebut yang menyatakan, antara lain, bahawa Kaedah-Kaedah Mahkamah Agung 1957, pelopor KMT tidak terpakai dalam prosiding kebankrapan.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Penekanan perlu diletakkan pada ungkapan 'menghormati rayuan-rayuan daripada Mahkamah Tinggi' dan bukan 'kepada Mahkamah Tinggi' (termasuklah hakim dalam kamar), oleh itu k 89 Kaedah tersebut bukan bertujuan untuk digunakan ke atas kes-kes berhubung dengan rayuan-rayuan daripada keputusan pendaftar kepada hakim dalam kamar. Kaedah 89 Kaedah tersebut digunakan apabila terdapat satu rayuan seterusnya kepada mahkamah tinggi daripada keputusan-keputusan hakim dalam kamar (lihat ms 525A, C).

(2) Pindaan k 276 Kaedah tersebut mula berkuatkuasa pada 1 April 1993 melalui PU(A) 60/93. Sekarang bermula daripada 1 April 1993, Kaedah-Kaedah Mahkamah Tinggi 1980, dengan ketiadaan apa-apa kaedah mengawal prosiding dalam Akta Kebankrapan atau Kaedah tersebut menggunakan *mutatis*

mutandis, walhal sebelum pindaan tersebut, Kaedah-Kaedah Mahkamah Agung 1957, pelopor KMT, mengawal prosedur dalam bidang kuasa sivilnya, tidak terpakai kecuali jika sebaliknya diperuntukkan oleh Kaedah-Kaedah Kebankrapan tersebut. Pindaan kepada k 276 Kaedah tersebut adalah untuk memenuhi keadaan sedemikian sebagaimana di dalam rayuan ini, oleh itu A 56 k 3 KMT terpakai dalam kes-kes rayuan terhadap keputusan pendaftar kepada hakim dalam kamar. Notis rayuan oleh JD adalah di luar had masa dan oleh itu notis tersebut ditolak (lihat ms 525F–H).

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 788–840.

Legislation referred to

Bankruptcy Rules 1969 rr 5(1), 18, 89, 276
Rules of the High Court 1980 O 56 rr 1(3), 3
Rules of the Supreme Court 1957

Jegathesan C (*C Jegathesan*) for the judgment debtor.
Mahamidah bte Mohamad (*HS Lim & Malik*) for the judgment creditor.

Idris J. :

Receiving and adjudication orders were made by the senior assistant registrar ('the SAR') on 8 October 1997 against the judgment debtor ('the JD') following a creditor's petition filed by the judgment creditor, Asia Commercial Finance (M) Bhd ('the JC'). Being dissatisfied with the said orders, the JD filed a notice of appeal to the judge in chambers on 16 October 1997. When the appeal came on for hearing before me, the JC's counsel indicated that she intended to raise a preliminary objection on the validity of the notice of appeal and that notice of such intention had been conveyed to the JD's counsel. I then made an order requiring counsel for both parties to file written submissions on this preliminary objection.

In their submissions, the JC's counsel contends that the instant appeal, being an appeal to the judge in chambers is governed by O 56 of the Rules of the High Court 1980 ('the RHC'), and of particular relevance is r 1(3) which states:

> 1 (3) Unless the Court otherwise order, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the day fixed for hearing the appeal.

Since the decision of SAR was given on 8 October 1997, the JC's counsel submits that the notice of appeal is not valid, it being filed on 16 October 1997, three days after the time frame fixed for filing such notice. She claims that r 89 of the Bankruptcy Rules 1969 ('the Rules') does not apply and thus

requests the court to reject the notice and dismiss it with costs. A

On the other hand, counsel for the JD disagrees with such contention and claims that the notice of appeal was filed well within the time frame specified for such appeal as r 89 applies. It is the submission of the JD's counsel that r 89 of the Rules, after its amendment through PU(A) 60/93 which came into force on 1 April 1993 remains unaffected and hence effect must be given to it. B

It is to be pointed out that before the amendment through PU(A) 60/93came into effect all bankruptcy matters and applications as listed out in r 5(1) of the Rules with the exception of para (a), were heard before the judge in open court. Only upon the coming into effect of PU(A) 60/93 r 5 of the Rules was amended which, amongst others, confers powers on the registrar to hear and determine any matter or application in chambers unless otherwise directed by the Chief Justice. As a result, some consequential amendments are required to be made to some of the Rules e.g. rr 18 and 276. C

Rule 18 of the Rules as it presently stands requires that unless directed by the Chief Justice, every application to the court shall be made by summons in chambers supported by affidavit to enable such application to be heard by the registrar as compared to the said rule as it stood prior to the amendment, requiring such application to be made by motion supported by affidavit, thereby only enabling the judge to hear it in open court. D

Another rule which is pertinent to this appeal is r 89 of the Rules. For convenience, reproduced hereunder is r 89 of the Rules: E

> Appeals
>
> The provisions and procedure for the time being in force respecting appeals from the High Court in its' ordinary civil jurisdiction shall apply to appeals in bankruptcy with the following modifications: F
>
> (a) The Official Assignee shall not be required to give security for costs.
> (b) The time for entering the appeal and serving notice thereof on the respondent shall be fourteen days from the date of the signing, entering or otherwise perfecting the judgment or order appealed from;
> (c) No appeal shall operate as a stay of proceedings under the judgment or order appealed from unless the Court otherwise directs. G

It will be observed that r 89 of the Rules is not affected by the amendment in 1993 and the said rule was incorporated in the original text when the Bankruptcy Rules 1969 first came into being when all matters and applications came before the judge in open court and the judge's decisions were appealable to the Federal Court in accordance with the provisions and procedures therein laid down respecting appeals from the High Court in its ordinary civil jurisdiction. By virtue of r 89 of the Rules such provisions and procedures are applicable *in toto* to appeals in bankruptcy for there being no qualifying words such as 'where applicable' or 'mutatis mutandis' in r 89 of the Rules. It will be noted that such provisions and procedures are comprehensive but need not be wholly applicable to an appeal to judge in chambers for some of the provisions are not relevant. In fact emphasis needs H I

be placed on the expression 'respecting appeals from the High Court' and not 'to the High Court' (which includes judge in chambers) and it seems to me that r 89 of the Rules is not intended to apply to cases in respect of the appeals from the registrar's decision to the judge in chambers.

The appeal to the judge in chambers in bankruptcy matters are broadly exercised following the amendment to r 5 of the Rules for prior to that such matters were triable by the judge in open court. Hence, it is absurd to argue that r 89 of the Rules is also intended to govern such matters as appeal to judge in chambers for when it was first introduced in Bankruptcy Rules 1969, it is thought not within the contemplation of the Rules Committee for a need to make provisions for appeal to judge in chambers as the situation then did not entail to have one. Only upon the extension of the jurisdiction in bankruptcy to the registrar to hear any matter or application would it only require to have such provisions and procedure. In the circumstances, I am of the view that r 89 of the Rules is to be invoked only when there is further appeal to the higher court from the decisions of the judge in chambers.

Counsel for the JD also refers to the pre and post amended r 276 of the Rules. Rule 276 of the Rules before the amendment reads:

> Save as provided by these Rules, the Rules of the Supreme Court regulating the procedure in its civil jurisdiction shall not apply to any proceeding in bankruptcy.

While the said rule after the amendment reads:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, mutatis mutandis.

The amended r 276 of the Rules came into effect on 1 April 1993 via PU(A) 60/93. Now as from 1 April 1993, the Rules of the High Court 1980, in the absence of any rule regulating the proceeding in the Bankruptcy Act or Rules applies *mutatis mutandis* whereas prior to the amendment, the Rules of the Supreme Court 1957, the precursor of the Rules of the High Court 1980, regulating the procedure in its civil jurisdiction, did not apply unless otherwise provided for by the Bankruptcy Rules. To my mind, the amendment to r 276 of the Rules is to cater for such situation as in this present appeal, thereby O 56 r 3 of the RHC applies in cases of appeal against the registrar's decision to the judge in chambers.

Accordingly, I hold that the notice of appeal filed by the JD on 16 October 1997 is time barred and therefore the notice is rejected. The appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Chew Phye Ken